

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

29572

FILE: B-214333

DATE: October 16, 1984

MATTER OF: Schmid Laboratories, Inc.

DIGEST:

1. The existence in a solicitation for a definite quantity contract of an option for increased quantities does not transform the proposed contract into an indefinite quantity contract.
2. Protest concerning alleged improprieties in a solicitation must be filed prior to the closing date for receipt of initial proposals. Therefore, protest after closing date that solicitation is structured to permit de facto sole-source procurement is untimely.

Schmid Laboratories, Inc. protests the terms of request for proposals (RFP) No. FGA-W-XTO18-N-2-10-84 issued by the General Services Administration (GSA). The solicitation was issued to procure condoms for the Agency for International Development. We deny the protest in part and dismiss it in part.

The RFP, as amended, expressly solicited offers for a definite quantity contract. In addition, the schedule specified a definite, fixed quantity for each of 13 contract line items. The solicitation also designated specific locations for delivery but stated that deliveries would only be made in response to individual purchase orders. The RFP stated that award would be made on an item-by-item basis unless an aggregate award could be made at a lower cost. The solicitation also included the following clause, which is primarily at issue:

"34. 'ALL OR NONE' BIDS

"(a) (Applicable to definite quantity contracts.) A bid submitted on an 'all or none' or similar basis will be evaluated as

030519

follows: The lowest acceptable bid exclusive of the 'all or none' bid will be selected with respect to each item (or group of items when the solicitation provides for aggregate awards) and the total cost of all items thus determined shall be compared with the total of the lowest acceptable 'all or none' bid. Award will be made so as to result in the lowest total cost to the Government.

"(b) (Applicable to requirements and indefinite quantity contracts.) A bid submitted on an 'all or none' or similar basis will not be considered unless the bid is low on each item to which the 'all or none' bid is made applicable. The term 'item' as used in the clause refers only to items which, under the terms of the solicitation, may be independently awarded and does not include any group of items on which an award is to be made in the aggregate."

GSA states that since the RFP by its terms contemplates a definite quantity contract, clause 34(a) necessarily applies and permits the agency to make an "all or none" award so long as the "all or none" bid is lower than the total of the low bid for all items. Citing various provisions of the amended solicitation, principally a 50 percent option for increased quantity, Schmid insists that the true intent of the RFP is that an indefinite quantity contract will be awarded, so that our Office should require GSA to evaluate offers under clause 34(b), which prohibits "all or none" offers unless the "all or none" bid is low on each item. Specifically, Schmid argues that these elements of an indefinite quantity contract are present in the solicitation with its option provision: 1) an indeterminate quantity at the time of award (base quantity plus unknown option quantity); 2) guaranteed minimum and maximum quantities; and 3) indefinite destination points. Schmid contends that the presence of the option for increased quantities transforms the contract into an indefinite quantity contract with the basic contract quantity being equivalent to a guaranteed minimum and the contract and option quantities together being equivalent to a stated maximum quantity. We find Schmid's arguments to be without merit.

Federal Procurement Regulations (FPR), 41 C.F.R. § 1-3.409(a) (1983) (in effect when the solicitation was issued), describe a definite quantity contract as providing for "a definite quantity of specified property . . . with deliveries or performance at designated locations upon order." Conversely, an indefinite quantity contract is described as providing for the "furnishing of an indefinite quantity, within stated limits, of specific property or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders." FPR, 41 C.F.R. § 1-3.409(c). The latter type of contract is used when it is impossible to determine in advance the precise quantities of the property that will be needed by the using activities. FPR, 41 C.F.R. § 1-3.409(c)(2).

Here, it is undisputed that the basic contract quantity solicited by GSA is fixed and definite. By its very nature, any option provision in any contract will render indeterminate, within limits, the quantities ultimately obtained by the government. Indeed, Schmid's arguments necessarily negate the very existence of a definite quantity contract with options. An option is merely an offer which may or may not be accepted at some future time. See B-159586, Sept. 23, 1966. We fail to see how an offer that may never be accepted for a quantity that may never be delivered affects the validity, nature or character of a binding definite quantity contract. Therefore, we agree with GSA that the offers should be evaluated under clause 34(a), applicable to definite quantity contracts.

Schmid also alleges that the 50 percent option for increased quantity is improper because the condoms are readily available in the open marketplace, and that a 50 percent option is more than that permitted under our decisions. GSA states, however, that the condoms are not readily available in sufficient quantities in the marketplace (GSA is purchasing approximately 350 million). Since the protester has not even attempted to rebut GSA's response, we are unable to disagree with GSA's conclusions. Further, we have not, in fact, objected to the exercise of options greater than 50 percent of the basic quantity. See, e.g., Universal Propulsion Co., B-186845, Jan. 26, 1977, 77-1 CPD ¶ 59; Raven Industries, Inc., B-185052, Feb. 11, 1976, 76-1 CPD ¶ 90.

Finally, Schmid notes that only one domestic producer is capable of furnishing the quantity of condoms solicited by GSA. Schmid suggests portions of the required quantity of condoms be broken out for competitive procurement. However, this protest ground, which concerns an alleged defect in the solicitation as issued, is untimely since, unlike the complaint about the 50 percent option, it was not raised by Schmid before initial proposals were due. 4 C.F.R. § 21.2(b)(1) (1984).

The protest is denied in part and dismissed in part.

fa *Milton J. Fowler*
Comptroller General
of the United States